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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of the Commission's Rules)
To Permit Flexible Service Offerings)
in the Commercial Mobile Radio Services)

WT Docket No. 96-6

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

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I. INTRODUCTION

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") respectfully submits these Comments on the Commission's Further Notice of Proposed Rule Making ("FNPRM") in the above-referenced proceeding.^{1/}

Pursuant to Section 332 (c) of the Communications Act of 1934 ("the Act"),^{2/} Nextel submits that the Commission has plenary jurisdiction over all Commercial Mobile Radio Services ("CMRS") -- whether fixed or mobile. Congress intended in the Omnibus Budget Reconciliation Act of 1993 ("93 Budget Act") to create a new CMRS regulatory classification that would enable wireless carriers to provide a wide range of competitive services to fulfill the needs and demands of telecommunications consumers. In doing so, Congress established the process for determining when CMRS services should be subjected to other than the Commission's CMRS jurisdiction.

^{1/} First Report and Order ("First R&O") and Further Notice Of Proposed Rule Making ("FNPRM"), FCC 96-283, released August 29, 1996.

^{2/} 47 U.S.C. Sections 153 et seq.

Therefore, the Commission need look no further than the provisions of 332 (c)(3)(A) to determine the point at which a CMRS provider's services are no longer within the scope of CMRS regulation and, therefore, subject to state regulation.

II. BACKGROUND

In the Notice of Proposed Rule Making resulting in the Commission's decision to permit CMRS licensees to offer both fixed and mobile services on their CMRS spectrum, the Commission proposed to treat all services provided by CMRS licensees -- whether fixed or mobile -- as "CMRS," specifically recognizing that it did "not want to discourage development of such [fixed and mobile] integrated networks by subjecting carriers to multiple layers of regulation."^{3/} In this FNPRM, however, the Commission has concluded that it must elicit further comment before making a final decision on the regulatory treatment of fixed services other than those that are ancillary, auxiliary or incidental to the mobile service offered by CMRS licensees.^{4/}

Specifically, the Commission proposes a "rebuttable presumption approach," wherein any CMRS provider's services would be presumed CMRS unless rebutted by "any interested party."^{5/} This approach, Nextel submits, is unnecessary, unduly complex, and would result in discouraging the very innovation that the Commission is seeking to encourage. The Commission previously

^{3/} FNPRM at para. 40.

^{4/} *Id.* at para. 47.

^{5/} *Id.* at para. 54.

stated that it must "ensure[] that regulation creates positive incentive for efficient investment -- rather than burdening entrepreneurial activities -- and . . . establish[] a stable, predictable regulatory environment that facilitates prudent business planning."6/

The "rebuttable presumption" approach, accompanied by its potentially endless legal battles, would be directly at odds with this goal. Thus, the Commission should rely on the provisions of the Act in which -- as it previously recognized -- Congress "chose . . . to delineate the circumstances under which [state] regulation [of CMRS services] might be applied,"7/ and employ that test for determining when a fixed CMRS service should be subject to regulations other than the Commission's CMRS provisions.

III. DISCUSSION

A. Congress Has Provided The Commission A Process For Regulating Fixed CMRS Services

In the '93 Budget Act, Congress established the CMRS regulatory classification of telecommunications providers, the intent of which was to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."8/ Thus,

6/ See Report and Order, PR Docket No. 94-105, 10 FCC Rcd 7486 (1995) ("California R&O") at para. 20. In this order, the Commission denied the State of California's petition to retain rate and entry regulation over CMRS.

7/ *Id.* at para. 19.

8/ H.R. Rep. No. 213 103d Cong., 1st Sess. 490 (1993) ("'93 Budget Act Conf. Rep."), accompanying Section 332(c)(1).

Congress expressly exempted CMRS services from state rate and entry regulation, providing that:

no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service . . .^{9/}

This Federal framework, moreover, was only to be disturbed if a State petitioned the Commission for authority to regulate rates and entry and could demonstrate that:

(i) market conditions with respect to such service fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.^{10/}

Congress and the Commission have further explained what is required to prove either of these factors, the Commission concluding that a state must "clear substantial hurdles" if it is to demonstrate that regulation is warranted.^{11/} In denying the State of California's petition to continue CMRS rate and entry regulation, the Commission stated that the '93 Budget Act

reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce regulation, and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.^{12/}

^{9/} 47 U.S.C. Section 332(c)(3)(A).

^{10/} 47 U.S.C. Section 332(c)(3)(A).

^{11/} California R&O at para. 4.

^{12/} *Id.* at para. 18.

The need for state regulation, moreover, is not proven by a showing of "imperfect" market conditions since "[a]lmost all markets are imperfectly competitive. . . ."13/ Rather, petitioners must "establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided."14/ The mere provision of a fixed service by a wireless carrier does not *per se* result in unreasonable discrimination. On the contrary, a CMRS carrier's provision of fixed services should increase competition in the fixed services market, e.g., local loop. Thus, pursuant to Section 332 (c)(3)(A)(i) of the Act, only a showing that the market does not protect consumers from unjust and unreasonable rates for that fixed service would suffice to subject the CMRS carrier to state regulation.

With regard to the second prong for justifying state regulation of a CMRS service, Congress more fully explained when fixed CMRS services would be subject to state regulation by including the following passage in the legislative history accompanying Section 332(c)(3)(A):

the Commission should permit the States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this

13/ *Id.* at para. 27.

14/ *Id.* at para. 28.

service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.^{15/}

In other words, Congress clearly recognized that CMRS providers potentially would be offering fixed services, i.e., "basic telephone services," and that the mere offering of such fixed services should not result in state regulation. Thus, Congress has already addressed the public policy concerns raised by the FNPRM, and provided that fixed CMRS services should be regulated as CMRS unless the service becomes a substantial landline substitute in a non-competitive market.

In addressing the regulation of CMRS services, Congress did not establish standards that would lead to state regulation depending on the type of service provided; instead, Congress established a "Federal regulatory framework" that would change only upon the demonstration of specifically delineated factors. Section 332(c) does not state that upon offering "basic telephone services," i.e., fixed services, the CMRS licensee is no longer offering CMRS services. Section 332(c)(3)(A) does not establish a "sliding scale" of fixed-to-mobile services that would result in reclassification of the CMRS provider when its services become "too fixed." On the contrary, as the Commission has already recognized, Congress "delineate[d] the [specific] circumstances in which such regulation might be applied."^{16/} Given Congress' pronouncement

^{15/} '93 Budget Act Conf. Rep. at p. 493.

^{16/} California R&O at par. 19.

on this issue, the Commission need not and should not establish any other test for the regulation of any kind of CMRS service.

B. The Definition Of "Commercial Mobile Radio Services" Encompasses Fixed Services Provided By CMRS Licensees

In establishing the new CMRS regulatory classification, Congress defined "mobile services" and "CMRS" broadly enough to encompass the fixed services that were anticipated to be provided by these new, competitive licensees. In Section 332(d), the Act defines "CMRS" as:

any mobile service (as defined in Section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public. . .^{17/}

A "mobile service," moreover, encompasses:

. . . (C) *any* service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or *any successor proceeding*. (emphasis added)^{18/}

The explicit inclusion of any service offered by a Personal Communications Service ("PCS") licensee, coupled with Congress' recognition that CMRS providers would be offering "basic telephone services," results in the inclusion of both fixed and mobile services within the definition of "CMRS."

Moreover, the language permitting the Commission to include "any" service offered pursuant to licenses assigned in "any successor proceeding," as well as the Commission's duty to ensure

^{17/} 47 U.S.C. Section 332(d)(1).

^{18/} 47 U.S.C. Section 153(27).

that all CMRS providers are subject to regulatory parity,^{19/} further ensures that fixed services offered by any CMRS provider -- not just PCS licensees -- are also encompassed within the realm of CMRS regulation. Permitting CMRS carriers to offer fixed services -- in addition to their mobile services -- and regulating them as CMRS, therefore, is consistent with the provisions of the Act, and encourages "competition between various providers of telecommunications services," as the Commission correctly noted in its First R&O in this proceeding.^{20/}

C. The Commission's Proposed "Rebuttable Presumption" Approach Would Discourage Innovation

Given the standards established by Congress in Section 332(c)(3)(A), the Commission's proposed rebuttable presumption approach is unnecessary. The proposal could result in state regulation of CMRS providers despite the fact that their services - - whether mobile, fixed or an integrated package of fixed and mobile -- are being offered to consumers in a competitive marketplace. This would be in direct contradiction to Section 332(c)(3)(A). Moreover, the rebuttable presumption approach would create significant regulatory uncertainty for CMRS companies which have been encouraged by Congress, the Commission and consumers to offer integrated fixed and mobile service packages.

^{19/} Section 6002(d)(3)(B) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI Section 6002(b), 107 Stat. 312, 392 (1993), required the Commission to ensure that all CMRS carriers are subject to "comparable" regulation.

^{20/} First R&O at para. 22.

Under the Commission's proposal, CMRS licensees seeking to provide new enhanced CMRS offerings, combining both fixed and mobile services, would be discouraged by not only the potential for state regulation but also by the certainty that "interested parties" will challenge the licensee's "CMRS status" at every turn. Even a CMRS licensee holding only one license could face numerous challenges -- whether from competitors, potential competitors or the multiple state commissions within the geographic area of the license. This added regulatory/litigious hurdle would create extra costs and significant uncertainty, thereby discouraging the creation of new and innovative services.

Beyond the certainty of fighting off these legal challenges, CMRS licensees would be further discouraged from introducing innovative services by the potential for layers of regulation from a multitude of states should a challenger succeed. The Commission recognized in the First R&O that "regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation."21/ Similarly, flexible spectrum use that results in added regulatory burdens from other arenas will likewise impede innovation and anticipation of consumer needs. This will be particularly true for nationwide providers like Nextel who would face up to 50 new layers of regulation from the states.

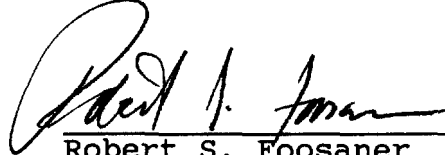
21/ First R&O at para. 22.

IV. CONCLUSION

In the '93 Budget Act, Congress established a process for determining whether a CMRS licensee's services -- including fixed CMRS services -- are within the realm of CMRS regulation and therefore exempt from state regulation. Congress expressly recognized that CMRS licensees would potentially provide fixed telephone services, and concluded that those services should be regulated as CMRS unless they become a substantial landline substitute in a non-competitive market. The Commission, therefore, should continue to regulate CMRS services -- whether fixed, mobile or both -- as CMRS pursuant to the standards of Section 332 (c)(3)(A) of the Act.

Respectfully submitted,

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Dated: November 25, 1996

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 25th day of November 1996, I caused a copy of the attached Comments of Nextel Communications, Inc. to be served by hand delivery to the following:

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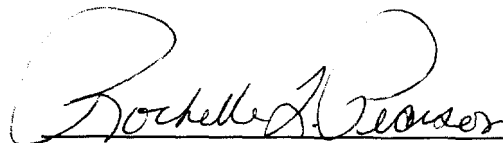
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